The trial court entered summary judgment against CalFed with respect to its lost-profits claim, ruling that the claim was too speculative as a matter of law. Pet. App. 22a-23a. The remaining claims proceeded to trial.

5. The court held a six-week trial on CalFed's remaining claims for recovery. In April 1999, the court awarded CalFed approximately $23 million in damages. Pet. App. 18a-52a. That award reflected the actual transaction costs incurred by CalFed in obtaining capital to replace the phased-out goodwill. *Id.* at 49a-51a. The court rejected petitioner's other claims for recovery, finding that "[t]he facts of this particular case do not establish that [CalFed] suffered monetary loss beyond its expenses of raising new capital." *Id.* at 52a.

a. *Restitution.* In denying CalFed's claim for restitution, the trial court rejected CalFed's theory that it had conferred a benefit on the government equal to the acquired thrifts' net liabilities by "assuming" those liabilities at the time of the acquisitions. The court pointed out that the government "remained responsible for those liabilities as if the contract[s] never had been executed" and found that, "[w]ere it not for falling interest rates, the United States probably would have had to make [the net] liabilities in the form of deposits good." Pet. App. 52a. The trial court found that the only benefit that CalFed had conferred upon the government was "buying time" until interest rates declined from their historic heights. *Ibid.*

b. *Replacement cost.* At trial, CalFed's replacement-cost model purported to show the costs to CalFed associated with three separate capital market transactions between 1992 and 1994. CalFed's expert theorized a hypothetical repurchase in 1998 of the stock CalFed issued between 1992 and 1994, claiming as a cost

the total value, in 1998, of the shares hypothetically repurchased to extinguish these claims. Pet. App. 50a; 2 C.A. App. A3000409-A3000419. Thus, the better CalFed performed and the more its market value increased after the capital market transactions, the more CalFed claimed it was damaged by these transactions. 1 C.A. App. A1003480. In addition, CalFed hypothesized what it would have cost to replace goodwill from 1998 forward had it raised capital at that point. In total, CalFed's expert opined that it cost $955 million in cash to replace $390 million in remaining goodwill. 2 C.A. App. A3000405.

In response, Dr. Merton Miller, winner of the Nobel Prize in Economic Science, and Daniel Fischel, Professor of Law and Business at the University of Chicago, explained to the trial court that the promise to pay dividends to new investors was indeed a cost of capital. 1 C.A. App. A1003470; 2 C.A. App. A3000407. However, they further explained that CalFed received cash in return for this promise to make dividend payments, and that the cash received equaled the expected discounted cost of future dividends, such that the "net costs" of raising capital to CalFed were transaction costs. 1 C.A. App. A10003431-A10003441, A1003470; 2 C.A. App. A3000407-A3000408. When it received cash upon the issuance of stock, CalFed not only replaced goodwill as a capital asset, it gained what goodwill did not provide: the ability to earn a return directly with the cash received. Because CalFed conceded that it received fair market value for the securities it issued, the experts concluded that the value of the income stream it received with the cash it raised equaled the expected discounted cost of the dividends CalFed promised. 2 C.A. App. A3000407-A3000408 & n.5.

The court found that CalFed suffered approximately $23 million in damages, relecting the actual transaction costs incurred by CalFed in obtaining capital to replace the phased-out goodwill. Pet. App. 48a-51a. Relying upon the testimony of Dr. Miller, the trial court found that, "[o]n the day stock is issued, the amount you receive for the stock is equivalent to its worth and the only costs are transaction, or flotation costs." *Id.* at 50a. In contrast, the trial court found that the testimony of CalFed's expert regarding hypothetical replacement costs was not credible, particularly because CalFed's expert assumed that the cash value of CalFed's goodwill, a non-earning asset, was approximately two and one-half times the amount of the goodwill. *Ibid.* The trial court concluded that any award in excess of transaction costs "would be more than necessary to make CalFed whole." *Id.* at 49a.

6. CalFed appealed the trial court's rejection of its lost profits, restitution, and cost of replacement claims. The Federal Circuit vacated the trial court's summary judgment ruling with respect to CalFed's lost profits claim and remanded for a trial. The court affirmed the judgment in all other respects. Pet. App. 1a-17a.

The court of appeals specifically affirmed the trial court's finding that the net cost of replacing CalFed's phased-out goodwill was the transaction cost incurred in obtaining the new capital. The court acknowledged that dividends and interest paid on capital to new investors are a "cost of capital." Pet. App. 14a. But the court noted that "the government's expert, Merton Miller, a Nobel Laureate in Economic Science, testified that the cost of replacing goodwill was floatation costs because the value of the cash proceeds of Cal Fed's newly-raised capital equaled the cost of future dividends." *Ibid.* The

court of appeals recognized that the trial court "found Cal Fed's experts not credible" on the issue of replacement costs, due, in part, to "their testimony that the cost of replacing $390 million of goodwill was nearly a billion dollars." *Ibid.* Applying a deferential standard of review, the court of appeals affirmed the trial court's award, "see[ing] no clear error in the court's factual finding that the floatation costs provided an appropriate measure of Cal Fed's damages incurred in replacing the supervisory goodwill with tangible capital." *Ibid.*

7. CalFed filed a petition for a writ of certiorari. CalFed challenged a number of rulings, including the court of appeals' judgment concerning the award of replacement costs and the judgment rejecting its claim for restitution. On January 22, 2002, this Court denied CalFed's petition. 534 U.S. 1113.

8. A second six-week trial was held in this case, addressing solely CalFed's lost profits claim upon remand. After reviewing voluminous documents and hearing from numerous fact and expert witnesses, the trial court found that CalFed's "lost profits model was not credible." Pet. App. 145a. The court found that CalFed had failed to establish *any* of the prerequisites for an expectancy recovery--foreseeability, causation, or reasonable certainty. *Id.* at 145a-146a.

CalFed challenged the trial court's rejection of its lost profits claim, as well as a claim for prejudgment interest, during a second appeal. CalFed did not attempt on that second appeal to raise any issue concerning the trial court's finding in the earlier proceedings that its costs of replacing capital were $ 23 million. The court of appeals affirmed the trial court's denial of CalFed's lost profits claim, Pet. App. 122a-143a, and its

claim for prejudgment interest, *id.* at 138a-139a. CalFed did not seek en banc review.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Petitioner's argument that there is an intra-circuit conflict is mistaken and was waived because it was not advanced in the court of appeals. In any event, although petitioner does not seek plenary review by this Court but only a remand to the court of appeals, further review of any kind would not be warranted to address a claim of an intra-circuit conflict.

1. On this petition, CalFed does not seek plenary review by this Court of its claim that the courts below incorrectly calculated the damages on its replacement-cost theory. Instead, CalFed argues that the Federal Circuit's decision in this case "is flatly inconsistent" with that court's later decision in *Home Savings of America* v. *United States*, 399 F.3d 1341 (2005). CalFed argues that this Court should assume that the *Home Savings* decision is correct, grant the petition for a writ of certiorari, vacate the decision of the court of appeals in this case, and remand for further consideration by that court in light of *Home Savings*. Even if there were an intra-circuit conflict on the replacement-cost issue *and* the decision in *Home Savings* (rather than in this case) were correct *and* the existence of such a conflict warranted this Court's exercise of jurisdiction, the petition should be denied because petitioner never presented its claim of an intra-circuit conflict to the Federal Circuit.

Petitioner's contention is that its costs for replacing the intangible supervisory capital that was eliminated from its balance sheet by FIRREA were much more

than the $23 million awarded by the Court of Federal Claims and affirmed by the court of appeals. In particular, petitioner asserts (Pet. 8) that the net costs of replacing the supervisory goodwill were not just the transaction costs it incurred in issuing new stock, but also the dividends it had to pay to its new shareholders.

Although petitioner now frames its request in terms of the Federal Circuit's decision in *Home Savings*, petitioner contends (Pet. 9) that the Federal Circuit had already concluded in *Lasalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1374-1375 (Fed. Cir. 2003), that such dividend and interest costs can constitute damages for a *Winstar*-type claim, and that the Federal Circuit merely reiterated that proposition in *Home Savings*. Indeed, the portion of the *Home Savings* decision that CalFed cites for the proposition that dividend and interest payments are always recoverable as "costs of capital" expressly relies upon *LaSalle Talman*. 399 F.3d at 1354 (citing *LaSalle Talman* for the proposition that "capital is not costless," and that the trial court had discretion to reject the government's transaction-cost analysis). Accordingly, petitioner's current claim that the Federal Circuit's decisions are internally inconsistent was available to it no later than the time that *LaSalle Talman* was decided.

The Federal Circuit decided *LaSalle Talman* on March 13, 2003. At no time between that date and January 19, 2005, when the Federal Circuit decided this appeal, did petitioner take any step to call the alleged internal conflict to the attention of the court of appeals. Although petitioner in its second appeal challenged the district court's conclusions that petitioner was not entitled to expectation damages and prejudgment interest, petitioner did not raise any issue in its second appeal

regarding the earlier cost-of-replacement damages award. To the contrary, in the Statement of Related Cases in its opening brief on its second appeal, petitioner stated that "the [court of appeals'] decision in this case might affect or be affected by, the resolution of other *Winstar*-type cases pending in the Court of Federal Claims or [the court of appeals] *in which the plaintiffs seek lost profits or prejudgment interest*." Pet. C.A. Br. ix (emphasis added).[2] Petitioner did *not* advance any claim that this case would be affected by *Home Savings*, which was then pending. Nor did petitioner assert more generally that this case would be affected by any *Winstar*-related cases in the trial court or court of appeals in which the plaintiffs seek the cost of replacement capital.[3]

Moreover, although petitioner now contends that the Federal Circuit's decisions are internally inconsistent, petitioner did not seek initial en banc hearing of its sec-

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[2] Rule 47.5 of the Federal Circuit's rules provides:

> Each principal brief must contain a statement of related cases indicating (a) whether [the same case has ever been on appeal]; or (b) the title and number of any case known to counsel to be pending in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal. If there are many related cases, they may be described generally, but the title and case number must be given for any case known to be pending in the Supreme Court, this court, or any other circuit court of appeals.

[3] Because petitioner did not mention the issue, the court of appeals' decision in the second appeal did not address the issue of the proper measure of petitioner's cost of replacing capital, and it did not explain its view of petitioner's claim of an internal conflict in the circuit. The issue petitioner now seeks to raise—the alleged internal conflict in the court of appeals' decisions—was neither pressed nor passed on below. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992).

ond appeal, or any part of it, so that the court of appeals would have the opportunity itself to address, in the first instance, the alleged inconsistency. See Fed. R. App. P. 35(a)(1) ("An en banc hearing or rehearing" of a case "is not favored and ordinarily will not be ordered *unless* * * * *en banc consideration is necessary to secure or maintain uniformity of the court's decisions.*") (emphasis added). Seeking en banc hearing would have been another way that petitioner could have brought its claim of an internal circuit conflict to the attention of the court of appeals. Petitioner, however, did not do so.

Finally, even after the Federal Circuit decided petitioner's second appeal on January 19, 2005, petitioner could have filed a petition for en banc rehearing, seeking to raise any issues concerning replacement costs and informing the court of appeals of petitioner's assertion that the court's decisions were in conflict. Although *Home Savings* was not decided until March 7, 2005, it was fully briefed and argued long before the Federal Circuit decided petitioner's second appeal.[1] Petitioner accordingly was in a position to be aware of the issues in *Home Savings*, and petitioner could have sought rehearing en banc in this case in light of the claimed conflict with *LaSalle Talman* and the pendency of *Home Savings*. Yet petitioner continued to take no step to bring any claim of an internal conflict in the circuit to the attention of the court of appeals.

Petitioner now asks this Court to analyze the court of appeals' decisions, determine whether they are in conflict, and to grant relief in this case on the ground that there is a conflict and the decisions favored by petitioner

[1] The reply brief for the plaintiff in *Home Savings* in the court of appeals was filed on May 3, 2004, and oral argument was held on September 8, 2004.

were the correct ones. The time to address the question whether the Federal Circuit's decisions are in conflict, however, would have been when petitioner was before that court. *E.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."). Because petitioner failed to do so, or even to raise any issue concerning replacement costs on its second appeal, it is now too late to obtain relief from this Court.[5]

2. In any event, petitioner's sole claim is that there is an internal conflict within the Federal Circuit regarding the proper calculation of the cost of replacement capital in *Winstar*-related cases. Even if that claim had been preserved and were correct, however, this Court has accepted as a fundamental premise of its certiorari jurisdiction that further review is not warranted to address a claim of an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); see *Davis* v. *United States*, 417 U.S. 333, 340 (1974) (certio-

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[5] As petitioner points out (Pet. 6-7), the government's brief in opposition to petitioner's earlier petition for certiorari generally opposed further review on *all* of the questions petitioner presented—including the question concerning the adequacy of the award for cost of replacement capital—on the ground that further review of the court of appeals' interlocutory decision was unwarranted. See 01-592 Br. in Opp. 12-15. The government also, however, specifically argued that petitioner's claim regarding the cost of replacement capital did not warrant further review in any event. The government explained, relying on the testimony of Prof. Miller and other evidence, that the trial court's findings regarding the costs of replacement capital were correct on the facts of this case, that those findings were properly affirmed by the court of appeals, and that the issue did not warrant further review. 01-592 Br. in Opp. 26-28. This Court denied review. 534 U.S. 1113.

rari not warranted despite conceded intra-circuit conflict on meaning of criminal statute).

a. Petitioner does not refer to any case in which this Court has granted certiorari, vacated a decision of the lower court, and remanded a case so that the lower court could address a claim of conflict with one of its own decisions. Petitioner cites (Pet. 12) *United States ex rel. Robinson* v. *Johnston*, 316 U.S. 649 (1942). In that case, the Court issued a grant, vacate, and remand (GVR) order, "[i]n view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case, *and* in view of this Court's [intervening] decision." *Ibid.* (emphasis added and citations omitted). There is no reason to believe that the internal disagreement in the Ninth Circuit would alone have been sufficient to warrant a GVR order.

Petitioner also cites (Pet. 12) *Alabama* v. *Ritter*, 454 U.S. 885 (1981). In that case, the Court issued a GVR order and remanded the case to the Alabama Supreme Court. The remand, however, had nothing to do with a concern for the consistency of that court's decisions, but rather was based on the need to determine if the state court had decided the case on the basis of federal or state law.

This Court initially issued a GVR order in *Ritter* in light of *Beck* v. *Alabama*, 447 U.S. 625 (1980). See *Ritter* v. *Alabama*, 448 U.S. 903 (1980). On remand, the Alabama Supreme Court held that the capital defendant in *Ritter* was entitled to a new trial. 403 So. 2d 154 (1981). The State filed a petition for certiorari, and respondent's sole argument in opposition was that the state court's decision rested on an independent and adequate state ground. 81-247 Br. in Opp. 1-6. This Court then issued the GVR order that petitioner cites, in which

this Court remanded for further consideration by the Alabama Supreme Court in light of *Reed* v. *State*, 407 So. 2d 162 (Ala. 1981)—a decision that respondent had characterized as "particularly instructive" in showing that the state court rested its decision on an independent and adequate state ground. 81-247 Br. in Opp. 4-5. Understanding that the purpose of the remand was to determine the federal or state basis for its decision, the Alabama Supreme Court issued a brief opinion on remand stating that it now would "unequivocally hold that our previous opinion in this case was based upon federal constitutional grounds, not state law grounds." *Ritter* v. *State*, 414 So. 2d 452 (1981).[6]

The purpose of the *Ritter* GVR order petitioner cites was thus to clarify whether the Alabama Supreme Court's earlier decision was based on federal or state grounds, a matter that went to this Court's jurisdiction to decide the case.[7] The GVR order was certainly not based on any internal conflict in the Alabama Supreme Court, since that Court's decisions in both *Ritter* and *Reed* had reached the identical conclusion—that a capital defendant was entitled to a new trial.

b. Petitioner also cites cases in which this Court has granted plenary review, contending that "this Court has

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[6] This Court then issued another GVR order in *Ritter* in light of its own later decision in *Hopper* v. *Evans*, 456 U.S. 605 (1982). See *Alabama* v. *Ritter*, 457 U.S. 1114 (1982).

[7] This Court's decision in *Michigan* v. *Long*, 463 U.S. 1032, 1037-1044 (1983), came after the GVR in *Ritter* and clarified the bases on which this Court would find an independent and adequate state ground for a state-court decision. See *id.* at 1038-1039 (noting that the Court had on occasion "vacated * * * a case in order to obtain clarification about the [federal-law or state-law] nature of a state court decision") (citations omitted).

granted review to resolve the apparent conflicts within a circuit when it has deemed the question important." Pet. 13. In support of that contention, petitioner cites three cases in which this Court granted plenary review, the most recent of which dates from almost forty years ago. *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 457 (1967); *Maggio* v. *Zeitz*, 333 U.S. 56, 59-60 (1948); *John Hancock Mut. Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939). None of those cases supports petitioner's argument that an internal conflict within a circuit would warrant further review here.

In *Bosch* and *John Hancock*, there were indeed claims that the court of appeals had reached conflicting decisions on the question presented. But this Court did not rest its decision to grant certiorari in either case on such a claim of conflict. In *Bosch*, the Court explained that "[w]hether these cases [from the court of appeals] conflict in principle or not, which is disputed here, *there does exist a widespread conflict among the circuits over the question and we granted certiorari to resolve it.*" 387 U.S. at 457 (emphasis added). In *John Hancock*, the Court stated that it granted certiorari "due to the differing views of the judges composing the court * * * *and* because of the importance of the question" presented. 308 U.S. at 181 (emphasis added).

In *Maggio* v. *Zeitz*, 333 U.S. 56 (1948), the court of appeals had wrestled with a complex tangle in bankruptcy law and concluded that it had to affirm a contempt order against the bankrupt individual. The court of appeals had stated that, "[a]lthough we know that [the bankrupt] cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct [the bankrupt] 'to do an impossibility, and then punish him for refusal to perform

it.'" *Id.* at 59 (quoting court of appeals' opinion). This Court explained that "the declaration [quoted above] is one which this Court, in view of its supervisory power over courts of bankruptcy, cannot ignore." *Ibid.* The Court also noted that the issues in the case "are important to successful bankruptcy administration." *Id.* at 61. Thus, though there may have also been an internal circuit disagreement, see *id.* at 59-60, this court granted review to address issues of continuing and more general importance in bankruptcy administration.

c. Because cases in the courts of appeals are ordinarily decided by shifting combinations of judges from multi-member courts, internal conflicts no doubt do occur with some frequency. Nonetheless, if this Court were to take the step of issuing GVR orders to address intra-circuit conflicts in cases like this, the same logic would invite numerous other litigants to bring similar claims before the Court to obtain similar relief. This Court has wisely viewed the en banc process, not this Court's certiorari jurisdiction and not the GVR procedure, as the means for the courts of appeals to address any lack of uniformity in their own decisions. The Court's traditional practice of not exercising its certiorari jurisdiction based on a claim of an intra-circuit conflict is a sound one. Adherence to that traditional practice is especially warranted in this case, because petitioner did not renew or preserve any issue concerning the cost of replacement capital on its second appeal, much less seek to have the Federal Circuit resolve the asserted inconsistency that petitioner now contends had already developed with that court's 2003 decision in *LaSalle Talman*. See pp. 11-15, *supra*.

3. The decision in this case was in any event correct. Moreover, because the Federal Circuit reviews trial

court decisions concerning the calculation of the value of replacement capital in *Winstar*-related cases under a deferential standard, petitioner errs in contending that the Federal Circuit's decision in this case conflicts with its decision in *Home Savings*.

a. In this case—on the first appeal—the court of appeals noted that the government's expert at trial, Nobel Laureate Professor Merton Miller, had "testified that the cost of replacing goodwill was floatation costs because the value of the cash proceeds of Cal Fed's newly-raised capital equaled the cost of future dividends." Pet. App. 14a. The court of appeals found that the trial court properly "discounted" CalFed's experts' testimony that "the cost of replacing $390 million of goodwill was nearly a billion dollars, based in part on the cost of repurchasing all outstanding stock by Cal Fed to eliminate the cost of paying dividends." *Ibid.* The court concluded that it "s[aw] no clear error in the court's factual finding that the floatation costs provided an appropriate measure of Cal Fed's damages incurred in replacing the supervisory goodwill with tangible capital." *Ibid.*

The court's decision was correct. Contrary to petitioner's characterizations, see Pet. 6, the Federal Circuit expressly recognized that dividend payments reflect a cost of capital. See Pet. App. 14a ("[T]he cost of replacing goodwill was floatation costs because the value of the cash proceeds of Cal Fed's newly-raised capital equaled *the cost of future dividends*.") (emphasis added). The court simply affirmed the trial court's finding that, although the future dividends Cal Fed promised to pay when it issued stock had a "cost," that cost was equal to the value of the cash proceeds that CalFed received for the stock, leaving the floatation costs as the *net* dam-

ages. That was consistent with Dr. Miller's testimony at trial. 1 C.A. App. A1003468-A1003472; see 1 *id.* at A1002461-1002462; 2 C.A. App. A3000400, A3000407-A3000409. Because there was no clear error in the trial court's finding that tangible, investable cash raised by CalFed gave CalFed a benefit, as well as imposing an approximately equal cost, the Federal Circuit properly affirmed the trial court's conclusion that the transaction costs reflected the true net cost of raising capital.

Contrary to CalFed's assertions (Pet. 7), the court of appeals did not hold on the first appeal in this case that the cost of new capital was "zero," and did not "exclude" dividends and interest payments from consideration as a cost of capital. Instead, the Federal Circuit affirmed the trial court's finding that the benefits of CalFed's capital raising (*i.e.*, the cash available for profitable investment by CalFed) offset the costs (*i.e.*, the claim on future dividends), except for transaction costs. That decision was fully supported by the only testimony the trial court, affirmed by the court of appeals, found to be credible.

A recent decision of this Court supports the reasonableness of the trial court's determination that when public companies such as CalFed raise capital by issuing securities such as stock in a market-based transaction, the cost to the firm of selling the stock is offset by the cash received by the firm. In *Dura Pharmaceuticals, Inc.* v. *Broudo*, 125 S. Ct. 1627 (2005), the plaintiff investor brought a securities fraud claim based upon false information the company disseminated, upon which the plaintiff relied when he purchased the company's stock. Public disclosure of the claimed fraud came several months after the plaintiff purchased the stock. The issue presented to this Court was whether the plaintiff

had properly pled damages by asserting that the purchase of the stock alone was sufficient to show damages—without asserting, as an element of causation, that the company's stock price dropped months later as a result of the disclosure of the fraud.

This Court held that the purchase of the stock, standing alone, was not sufficient to show damages. The Court explained that the cost to the plaintiff of purchasing a share of stock "is offset by ownership of a share that *at that instant* possesses equivalent value." 125 S. Ct. at 1631. If the fraud had never been disclosed, or if the ultimate disclosure of the fraud had no effect upon the value of the security, the plaintiff could have re-sold the stock and received back precisely what he paid in the first place. *Ibid.* More fundamentally, the price paid for any security purchased in the market, reflecting the present value of the future cash flows one expects to receive, results in no economic cost or damage at point of purchase. See *ibid.*

In this case, the same economic principle is at stake, although from the firm's perspective. When CalFed issued securities and obtained cash to replace a non-earning asset such as goodwill, the price received in cash for issuing the securities was of "equivalent value" to the securities. The securities represented claims on CalFed's future earnings, and the cash CalFed received was available for it to invest in its business to produce those earnings. In other words, as the government's experts explained to the trial court in this case, "the cost of replacing goodwill was floatation costs because the value of the cash proceeds of Cal Fed's newly-raised capital equaled the cost of future dividends." Pet. App. 14a. At the very least, the trial court did not make a

clearly erroneous factual finding, or abuse its discretion, when it credited that evidence.[8]

b. In *Home Savings*, the court of appeals affirmed an award of damages for replacement capital that exceeded the transaction costs the plaintiff incurred in raising that capital. 399 F.3d at 1353-1355. As in this case, however, the court's affirmance was not based on a de novo review of the trial court record. Instead, the court used a deferential, abuse-of-discretion standard. The court concluded that it "s[aw] no abuse of discretion in the trial court's methodology for calculating the cost of replacement capital," and it "h[e]ld that the [trial] court did not abuse its discretion in setting up its model." *Id.* at 1354.

In particular, the court of appeals recognized in *Home Savings*, as it had in this case, that raising capital has a cost, which is "the required rate of return on various terms of financing." 399 F.3d at 1354. But the court of appeals also recognized, as it did in this case, that the cash raised by issuing stock had a benefit as well, and

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[8] In *Bank United v. United States*, 80 Fed. Appx. 663 (Fed. Cir. 2003), the Federal Circuit again affirmed a trial court finding that the net cost of replacing goodwill with tangible capital did not exceed transactions costs. Relying upon its decision in this case, the Federal Circuit reasoned:

> The trial court's finding that Appellants' mitigation costs associated with the 1992 preferred stock offering were restricted to transaction costs is consistent with testimony offered by the government's lead expert at trial that, because the value of the cash proceeds of a capital offering equal the expected expense of future dividends, the true costs of such a transaction are limited to floatation costs. We have previously declined to hold such a finding clearly erroneous, and we do so again here.

Id. at 672.

that the costs must be "discounted" by the value of the benefit. *Ibid.* See *ibid.* ("Supervisory goodwill merely provides a thrift with 'leverage,' or legal permission to obtain additional deposits, whereas cash is 'tangible capital' that can both provide leverage and fund loans."). In *Home Savings*, the trial court had calculated the "incidental benefits" of the goodwill as equal to the cost of the deposits the thrift no longer had to obtain in order to raise cash. Because deposits are insured by the government (although they are also direct claims on the thrift's own assets and attracting more deposits may require paying higher interest rates on existing deposits as well), the trial court had (mistakenly, in our view) estimated that cost using the rate paid for a comparable government-backed asset, the intermediate-term Treasury bond. The trial court had then deducted that amount from the value of the dividends that the bank promised to pay on its new capital instruments. *Ibid.* The court of appeals in *Home Savings* held that, in reaching that conclusion, "[t]he [trial] court's approach to calculating the benefits of cash was * * * within the court's sound discretion." *Id.* at 1354-1355.

c. Because the court of appeals employed a deferential standard of review both in this case and in *Home Savings*, the court's conclusions in the two cases do not conflict. The court of appeals did not hold in either case that there is only one way to calculate the various values involved in the particular case of a thrift that, in a *Winstar*-related case, raised capital to replace the intangible capital lost when the use of goodwill was phased out. The court of appeals in this case affirmed the trial court's finding that the value of the cash the thrift received here was roughly equal to the value of the future stream of dividends the thrift was promising to pay.

The court of appeals in *Home Savings* affirmed the trial court's finding in that case that the value of the cash was less than the rate of return on the financing. Because the court of appeals was applying a deferential standard of review in both cases—and the records and contentions of the parties in the two cases differed[9]—the decisions affirming the trial court's findings in each case are not inconsistent.

Petitioner argues that the court of appeals in *Home Savings* recognized that the question of how to calculate the cost of replacement capital in a *Winstar*-related case is a "legal issue," Pet. 10, and that "the *measure* of damages is always a question of law to be reviewed *de novo*," Pet. 11.[10] The court of appeals, however, made quite

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[9] For example, when CalFed in its first appeal did claim that the trial court had erred in calculating the cost of replacement capital, CalFed did not advance the theory that the court of appeals affirmed in *Home Savings*—that the benefit of the cash the firm obtains by selling stock is to be measured by the relatively low interest rate on deposits that the thrift would otherwise have had to obtain. See Pet. C.A. Br. 60-62; Pet. C.A. Reply Br. 28-30.

[10] The cases CalFed cites (Pet. 11) for the proposition that the "*measure* of damages is always a question of law to be reviewed de novo" are inapposite. The standard of review discussed in those cases did not address a question like the one here—the comparison between the value of the benefits a thrift receives from cash raised in a financing transaction, as opposed to the cost to the thrift of the promised dividend stream. Instead, they addressed much more general theories of what types of damages recovery are permitted, given the particular liability theory pursued. For example, in *Boston Old Colony Ins. Co. v. Tiner Assoc., Inc.*, 288 F.3d 222, 230 (5th Cir. 2002), the court reviewed de novo the district court's determination that the governing state law recognized the cost of replacing tortiously damaged property as the cost of restoration, without depreciation. The court did not hold that the cost of replacing tortiously damaged property itself should be reviewed de novo. See *Scully v. U.S. Wats, Inc.*, 238 F.3d 497, 509, 512

clear in *Home Savings* that it was *not* engaging in de novo review of the pertinent trial court findings. Instead, it stated in *Home Savings* that it would "review the [trial] court's methodology for assessing the cost of replacement capital, including its use of a 'safe rate' of return to account for the inherent benefits of the replacement capital, *for abuse of discretion*." 399 F.3d at 1347 (emphasis added). The court derived that standard from its prior decision in *SmithKline Diagnostics, Inc. v. Helena Labs. Corp*, 926 F.2d 1161, 1164 (Fed. Cir. 1991), where it held that, while factual findings are ordinarily subject to the clearly erroneous standard of review, "certain subsidiary decisions" involved in a trial court's actual finding of the precise dollar amount of damages "are discretionary with the court" and "are, of course, reviewed under the abuse of discretion standard." See *Home Savings*, 399 F.3d at 1346-1347. The court's conclusions in *Home Savings* that the trial court "did not abuse its discretion in setting up its model," and that "[t]he court's approach to calculating the benefits of cash was * * * within the [trial] court's sound discretion," *id.* at 1354-1355, are inconsistent with petitioner's

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(3d Cir. 2001) (comparing "conversion" versus "breach of contract" theories on the facts of the case, concluding that "given the myriad factors that might arise in each case, we doubt that any single universal damage theory could properly value stock options in all situations," and "agree[ing] with the District Court's damage calculation because it properly weighed and balanced the strengths and weaknesses of competing damage calculation methods"); *Delchi Carrier, SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028-1031 (2d Cir. 1995) (general principles of "lost profits" calculation and availability of incidental or consequential damages); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1516 (9th Cir. 1986) (damages for union's duty of fair representation do not terminate upon employee's obtaining interim employment and should include value of lost fringe benefits).

claim that the Federal Circuit passed on the damages issue in *Home Savings* as a matter of law.

4. Finally, as explained above, the question presented in this case concerns the proper valuation of the cash a thrift receives when it issues securities to replace the capital it lost as a result of a breach of contract. Petitioner cites no case outside the *Winstar* context in which a court has decided that issue. Indeed, of the approximately 120 *Winstar*-related cases that were originally filed, petitioner cites only a few in which the thrift engaged in capital-raising transactions to replace goodwill and in which the cost of raising capital was of significant importance. Moreover, because only approximately 39 *Winstar*-related cases of any sort are still pending, the issue now affects a progressively smaller and steadily dwindling number of cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 04-1557

IN THE

Supreme Court of the United States

CALIFORNIA FEDERAL BANK,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner California Federal Bank ("CalFed") respectfully submits this reply in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

ARGUMENT

In this case, the lower courts accepted the government's theory that "the *only* costs" of raising replacement capital "are transaction, or flotation costs." Pet. App. 50a (emphasis added); *see id.* at 14a. In *Home Savings of America, F.S.B. v. United States*, 399 F.3d 1341 (Fed. Cir. 2005), the Federal Circuit squarely *rejected* "the argument made by the government's expert that capital has no cost other than transaction costs." *Id.* at 1354. In light of the flatly inconsistent positions on this issue adopted by the Federal Circuit, CalFed has asked this Court to grant review, vacate the decision below, and remand for further consideration in light of *Home Savings*. The government's arguments against issuance of a GVR order are unavailing.

1. The government's principal argument is that CalFed waived its right to invoke *Home Savings* by not presenting this argument in the first instance to the court of appeals. Opp. 11-15. But *Home Savings* was issued after the decision in this case (and after the time for a petition for rehearing had run); the government's position is thus baseless.

The government maintains that CalFed should have raised the replacement cost issue in the second appeal in light of *LaSalle Talman Bank v. United States*, 317 F.3d 1363 (Fed. Cir. 2003). Opp. 12-13. Although *LaSalle Talman* did allow recovery of certain payments in excess of transaction costs, the court viewed the issue as a *factual* one, as it had in this case. *See* 317 F.3d at 1374-75. *LaSalle Talman* thus gave no basis for revisiting the Federal Circuit's ruling in the

first appeal that "[w]e see *no clear error* in the court's factual finding that the flotation costs provided an appropriate measure of CalFed's damages . . . ." Pet. App. 14a (emphasis added). Indeed, after *LaSalle Talman*, the Federal Circuit cited its first decision in this case in affirming, on factual grounds, a trial court's refusal to award costs in excess of transaction costs. *Bank United v. United States*, 80 Fed. Appx. 663, 672 (Fed. Cir. 2003) ("We have previously declined to hold such a finding clearly erroneous, and we do so again here").

It was not until *Home Savings* that the Federal Circuit decided that the appropriate measure of replacement cost damages is a *legal*, not factual, question. Moreover, *Home Savings* resolved that question by deciding, as a matter of law, that the costs of raising replacement capital are *not* limited to transaction costs. Both aspects of the *Home Savings* decision flatly contradict the Federal Circuit's decision in this case. The government's contention that "[t]he time to address the question whether the Federal Circuit's decisions are in conflict . . . would have been when [CalFed] was before that court" (Opp. 15) simply ignores the reality that *Home Savings* was decided after CalFed's time to petition for rehearing had expired.

2. The government points out that this Court ordinarily does not grant plenary review to resolve intra-circuit conflicts. Opp. 15. But the Federal Circuit's decision in this case conflicts not only with *Home Savings*, but also with numerous decisions of other courts of appeals (none of which is addressed by the government). *See* Pet. 11. If not for the corrective ruling in *Home Savings*, plenary review would be warranted in this case. In light of *Home Savings*, however, a GVR order would be a more efficient use of this Court's resources than a grant of plenary review.

The government does not dispute that this case meets all of the traditional criteria for issuing a GVR order. *See* Pet.

12-13 (discussing *Lawrence v. Chater*, 516 U.S. 163 (1996), which is not addressed in the government's opposition). Although the government contends that the Court has not previously GVR'd in these precise circumstances (Opp. 16-18), the government was unable to locate even a single case in which the Court has *declined* a GVR request in these circumstances. This is undoubtedly because it will only rarely occur that a federal court of appeals will make a 180-degree change of course during the narrow window of time between the expiration of the rehearing deadline and the time for filing a petition for a writ of certiorari. For this reason, the government's concern that granting a GVR order in this case "would invite numerous other litigants to bring similar claims before the Court to obtain similar relief" (Opp. 19) is unfounded. The government has not shown that any other litigants have ever been in the unusual position faced by CalFed.

3. The government maintains that the Federal Circuit's decision in this case was correct and can somehow be reconciled with *Home Savings*. Opp. 20-26. The government is wrong.

a. In this case, the government's expert testified that "[o]n the day stock is issued, the amount you receive for the stock is equivalent to its worth and the only costs are transaction, or flotation costs." Pet. App. 50a. In other words, "the cost of replacing goodwill was flotation costs because the value of the cash proceeds of CalFed's newly-raised capital equaled the cost of future dividends." *Id.* at 14a. The Federal Circuit affirmed the trial court's "factual finding that the flotation costs provided an appropriate measure of CalFed's damages." *Ibid.*

In *Home Savings*, the government "insist[ed] that economic principles prove that capital has no cost other than transaction costs because raising capital represents a zero-sum exchange." 399 F.3d at 1353. This argument was based

on trial testimony that was substantially identical to that presented by the government in this case. In sharp contrast to its decision in this case, the Federal Circuit ruled that the trial court had "correctly discounted the argument made by the government's expert that capital has no cost other than transaction costs." *Id.* at 1354. The court went on to hold, as a matter of law, that "capital is not costless; its cost is the required rate of return on various terms of financing." *Ibid.*

In both this case and *Home Savings*, a thrift raised capital in the external markets to replace goodwill that the government, in breach of its contractual commitments, had abrogated. In this case, the lower courts held that the damages for raising replacement capital were limited to transaction costs. In *Home Savings*, the lower courts held that the damages for raising replacement capital were *not* limited to transaction costs. The two cases cannot be reconciled.

b. Without denying that the *results* reached in the two cases are diametrically opposed, the government contends that "[b]ecause the court of appeals employed a deferential standard of review both in this case and in *Home Savings*, the court's conclusions in the two cases do not conflict." Opp. 24. This is mere sophistry.

The standard of review applied in this case was the "clearly erroneous" standard applicable to factual findings. The Federal Circuit found "no clear error" in the trial court's "finding" that the costs in excess of transaction costs incurred by CalFed were not recoverable as damages. Pet. App. 14a.

In *Home Savings*, the Federal Circuit expressly ruled that the measure of damages is *not* reviewed for clear error. 399 F.3d at 1346-47. Rather, the court "review[ed] the court's methodology for assessing the cost of replacement capital . . . for abuse of discretion." *Id.* at 1347. Of course, a trial court "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). After *Home Savings*, it would be an abuse of discretion for a court

to conclude that capital is costless, such that damages for raising replacement capital would be limited to transaction costs. But that is precisely what the courts below concluded in this case.

The *Home Savings* court held that the precise theory advanced by the government and relied on by the court of appeals in this case to deny CalFed an award of damages *is legally erroneous*. The Federal Circuit further held in *Home Savings* the cost of capital "is the required rate of return on various terms of financing" (399 F.3d at 1354), which is what CalFed sought to recover but the courts below refused to award. This refusal was based on the now legally discredited notion that the cost of dividends is recovered in the proceeds of the stock issuance; although the government clings to this notion (*see* Opp. 20), it was rejected as a matter of law in *Home Savings*.

Apparently recognizing that CalFed would be entitled to additional relief if the rule of *Home Savings* were applied to its circumstances, the government maintains that *Home Savings* is "mistaken[]" and contends that CalFed is asking the Court "to grant relief in this case on the ground that . . . the decisions favored by [CalFed] were the correct ones." Opp. 24, 14-15. But a GVR order does not require this Court to determine whether the Federal Circuit got it right in this case or in *Home Savings*—although it is significant that the government did not challenge this aspect of *Home Savings* in its petition for rehearing to the Federal Circuit, and thus should not be heard to contend that the decision is wrongly decided. The salient point is that the two decisions cannot be reconciled; and the court of appeals should have the opportunity to resolve that conflict within its decisional law. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). A GVR order is warranted to allow the Federal Circuit to reconsider CalFed's claim for replacement cost damages in light of the intervening *Home Savings* decision.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the Federal Circuit's judgment, and remand for further consideration in light of *Home Savings of America, F.S.B. v. United States*, 399 F.3d 1341 (Fed. Cir. 2005).

Respectfully submitted.

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